Nov. 15, 2007

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Dear Carol and Fran:

CLEEN is delighted to be participating in the process of updating the Prop. 65 regulations. The workshop on Nov. 2 was useful as a starting point, and we hope to help streamline this, and make it minimally adversarial.

At the workshop, you asked for suggestions on priorities. We think you should start with definitions; we have some proposed language below. Next, we would like to see you tackle the issue of making NSRL levels binding (§§ 12701(a) and 12801(a), see below). We would like to amend certain sections regarding NSRLs and MADLs to take into consideration the smaller body weights of children. We would like to amend § 12601 to make explicit that a consumer must be warned of the toxic elements of a product before he/she purchases it via the internet, phone, or by mail, so that a shipped item does not arrive with an unanticipated Prop. 65 warning. Finally, we would like to amend § 12305 to make more explicit the duties of the Carcinogen Identification and Developmental and Reproductive Toxicants ID Committees so that they revise the Prop. 65 chemical lists in a more timely fashion. Once you decide on a timeline and schedule workshops to discuss specific sections, we will outline other areas we are interested in editing. But this is a start.

We are concerned about some of the issues brought up at the workshop, and urge you to save your time and resources for making only changes that will further the intent of the statute. You need not spend time amending the regulations to assess the relative liability of manufacturers, distributors and retailers. Prop. 65 is a right-to-know statute, and the State's interest is in making sure that the public is warned when being exposed to listed toxic chemicals. The Statutory language, which cannot be altered except by a vote of the people, places the responsibility for warning on the producer or packager, as opposed to the retailer, "to the extent practicable." As long as a clear and reasonable warning is placed to potentially exposed individuals, it is not necessary or advisable for the State to get into the business of divvying up responsibility among the manufacturer, producer, packager or retailer, given that every situation is different. Clearly this issue was anticipated by the authors of the statute and by the drafters of the regulations, and the bottom line is that ALL the actors in the stream of commerce are responsible for making sure that the public is warned.

At the workshop, one speaker brought up the issue of "opportunity to cure." We note that prospective defendants already have such an opportunity – as soon as they receive their 60-day notices notifying them of alleged violation. If the speaker was suggesting that curing the exposure should absolve the prospective defendant of penalties for past

violations, then that is covered in the statute, in § 25349.7(2), which directs the court to consider the violator's behavior in assessing penalties and sets forth seven factors, including § 25349.7(2)(G) – "any other factor that justice may require." If there were no penalties for putting a toxic product into the stream of commerce, a knowing producer, packager or retailer might have no incentive to reformulate unless and until he received a 60-day notice.

Finally, a couple of speakers representing retailers asked that the regulations be amended to allow for more specificity in 60-day notices. For notices of violation involving consumer product exposures, § 12903(b)(D) requires "sufficient specificity" to inform the recipients of the nature of the items allegedly sold in violation of the law and to distinguish those items from others not in violation. As the regulations currently stand, "sufficiency" clearly is in the eye of the recipient. Since every situation and product is different, it would be unwieldy to make the regulations more explicit. Furthermore, when the regulations implementing SB 471 were developed in 2003 and Certificates of Merit became mandatory, the issue of specificity of 60-day notices was fully considered. All the regulations governing the requirements of a Certificate of Merit assume a notice that is specific enough for the plaintiff's attorney to vouch for and for the AG's office to review. Nothing in the last three years has emerged to illuminate any issues that did not come forth during those recent discussions.

The following are specific changes we propose for the regulations:

<u>Definitions (additions in boldface):</u>

12102(i) "Expose" means to cause to ingest, inhale, contact via body surfaces, **put into the stream of commerce** or otherwise come into contact with a listed chemical. An individual …

ADD after 12102(l):
"Intentional" means to intend the natural consequences of one's actions.

12102(n) "Knowingly" refers to knowledge of the fact that a discharge of, release of, or exposure to a chemical listed pursuant to Section 25249.8(a) of the Act is occurring, **and includes knowledge of a condition or fact that one using ordinary care or diligence would possess. Knowledge should be presumed from receipt of a "notice of violation," as specified in Section 12903(b).**

ADD after 120102(p):
"Person" means an individual, trust, firm, joint stock company, corporation, company, partnership, limited liability company, and association, and franchisee or agent of listed entities.

<u>Deletions regarding binding NSRL levels</u>:

§ 12701(a) Delete the final sentence: Nothing in this article shall preclude a person from using evidence, standards, risk assessment methodologies, principles, assumptions or levels not described in this article to establish that a level of exposure to a listed chemical poses no significant risk.

§ 12801(a) Delete the final sentence: Nothing in this article shall preclude a person from using evidence, standards, risk assessment methodologies, principles, assumptions or levels not described in this article to establish that a level of exposure has no observable effect at one thousand (1,000) times the level in question.

Please let us know which of the issues set forth above OEHHA is considering and CLEEN will provide support for its proposal at that time. Of course, should you want additional information on any of these matters, we will be happy to oblige. Thanks for inviting us to comment on the process. CLEEN members and I look forward to participating in future workshops.

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